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Supreme Court, U.S.
FILED

'98 1820 MAY 7 1999

No.

In the OFFICE OF THE CLERK
Supreme Court of the United States

OCTOBER TERM 1999

JAMES SPANGLER, DONALD MELCHER, WAYNE J. BIELEFELDT, ET AL.,
Petitioners,

v.

ALTEC INTERNATIONAL LIMITED PARTNERSHIP, CHART INDUSTRIES, INC. and ALTEC INTERNATIONAL LIMITED PARTNERSHIP PENSION PLAN AND TRUST FOR HOURLY EMPLOYEES,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Court of Appeal's decision conflict with this Court's ruling in *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1965, 134 L.Ed2d 130 (1996) and with decisions in other circuits by holding that in an ERISA breach of fiduciary duty case, the applicable statute of limitations of 29 U.S.C. § 1113(1)(A) can start to run before the benefits in question are denied and before the plaintiffs are aware of the breach?

2. In determining whether or not the ERISA statute of limitations in 29 U.S.C. § 1113(1)(A) bars a claim for a breach of fiduciary duty, does the last act constituting a breach occur when the representee, without knowledge of the future breach, relies on the fudiciary's representations regarding future benefits? Or, does the last act constituting a breach occur when the fiduciary was required, but failed, to perform in accordance with the representations made?

PARTIES TO THE PROCEEDINGS

The plaintiffs-petitioners in this action are James Spangler, Donald Melcher, Wayne J. Bielefeldt, Dale Christianson, Robert Clark, Harold Danielson, Dennis A. Gerke, David Goode, Keith Huber, William Hutschenreuter, Ray Janisch, Oswald A. Klomsten, Jerry Munyon, Emil D. Potaracke, Roderick Sand, Gordon Stenslien, Stanley Stugen, Robert Taylor. Each plaintiff-petitioner is an individual adult.

The defendant-respondent Altec International Limited Partnership, f/k/a Altec International, Inc., f/k/a Albraze International, Inc., is a Delaware limited partnership having its principal place of business at 2191 Ward Avenue, La Crosse, Wisconsin. Thus, it does not have a parent company nor are there any wholly owned subsidiaries.

Further, the defendant-respondent Chart Industries, Inc. is a Delaware corporation having its principal place of business at 35555 Curtis Blvd., Eastlake, Ohio. It has no parent company nor any wholly owned subsidiaries.

Finally, the defendant-respondent Altec International Limited Partnership Pension Plan and Trust for Hourly Employees is an employee pension benefit plan as defined under § 3(2) of ERISA with its principal place of business at 2191 Ward Avenue, La Crosse, Wisconsin. It has no parent company nor any wholly owned subsidiaries.

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CITATIONS OF REPORTS

Order of March 12, 1999 entered by the Seventh Circuit Court of Appeals, Case Number 98-2437 in the matter of *James Spangler, Donald Melcher, Wayne J. Bielefeldt, et al. v. Altec International Limited Partnership, Chart Industries, Incorporated, and Altec International Limited Partnership Pension Plan and Trust for Hourly Employees*

Judgment of February 9, 1999 entered by the Seventh Circuit Court of Appeals, Case Number 98-2437 in the matter of the *James Spangler, Donald Melcher, Wayne J. Bielefeldt, et al. v. Altec International Limited Partnership, Chart Industries, Incorporated, and Altec International Limited Partnership Pension Plan and Trust for Hourly Employees*

PETITION FOR WRIT OF CERTIORARI

James Spangler, Donald Melcher, Wayne J. Bielefeldt, et al. (collectively referred to as "Spangler") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit on February 9, 1999, because (1) the court of appeals decision conflicts with decisions of the United States Supreme Court and with other United States Court of Appeals decisions on the same important matter; (2) the decision has departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power, all within the meaning of Sup. Ct. R. 10(a) and (c).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit that gives rise to this petition was filed on February 9, 1999. It is reprinted in the appendix hereto at App. A at App. 1 - App. 9. By order filed March 12, 1999, the Seventh Circuit denied a petition for rehearing. App. B at App. 10 - App. 11. The appeal to the United States Court of Appeals was from an opinion and order in the United States District Court for the Western District of Wisconsin dated April 13, 1998. The defendants opposed the court's retention of supplemental jurisdiction over remaining state law claims which was granted in an opinion and order dated May 11, 1998. Judgment was entered on May 12, 1998. The opinion and order granting summary judgment and the opinion and order and judgment granting defendants' motion opposing the court's retention of supplemental jurisdiction over remaining state law claims are reprinted in the appendix hereto at App. C at App. 12 - App. 23, App. D at App. 24 - App. 29.

JURISDICTION

On April 13, 1998 the United States District Court for the Western District of Wisconsin issued an opinion and order dismissing Spangler's complaint. On May 11, 1998 the district court granted defendants' motion opposing the court's retention of supplemental jurisdiction over remaining state law claims. Judgment was entered on May 12, 1998. Spangler timely appealed to the Seventh Circuit, which affirmed in an order and judgment filed February 9, 1999. On February 23, 1999, the Seventh Circuit accepted Spangler's petition for rehearing which was denied on March 12, 1999. This petition is being filed within ninety days of

the order and judgment dated February 9, 1999, as provided by Sup. Ct. R. 13(1).

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUES AND FEDERAL RULES INVOLVED IN THIS CASE

29 U.S.C. § 1113

STATEMENT OF THE CASE

A. Statement of Facts

The Plaintiffs are a mix of eighteen past and present employees of Altec International Limited Partnership, f/k/a Albraze, which is owned or controlled by Chart Industries, Inc., and Arthur Holmes (hereinafter collectively referred to as "Altec"). Mr. Holmes is a principle in Altec. Plaintiffs brought this action alleging violations of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, as amended, 29 U.S.C. §1001 *et seq.*, federal common law arising thereunder, and certain state laws. Prior to Altec, Plaintiffs were employed by Trane Company (hereinafter "Trane") as skilled welders at its brazed aluminum manufacturing plant known as plant three. (App. F at App. 33 - App. 34.)

In or about late 1985 and early 1986 Trane desired to sell its brazed aluminum operations. During this time, various meetings were held with Trane employees, including the plaintiffs, regarding Altec's purchase of Trane's brazed aluminum operations and the resulting effect on the existing

employees, including the plaintiffs (hereinafter the "Meetings"). (App. F at App. 34.)

Altec needed experienced, skilled welders like the plaintiffs in order to continue the plant three operations and to train a new generation of welders. Altec was unable to recruit highly skilled welders such as the Plaintiffs elsewhere. (App. F at App. 34.)

The work of the plaintiffs as welders involved highly specialized training and skills for performing internal repair of brazed aluminum heat exchangers. Very few companies in the world manufacture such units and the plaintiffs would be sent around the globe to make on-site repairs. (App. F at App. 34.)

Plaintiffs were concerned about transferring to Altec. They had many years of service and seniority at Trane and did not want to lose the benefits that they would have had at Trane on their retirement from Trane. At the Meetings, the plaintiffs raised concerns whether, upon retirement, they would lose benefits in comparison to remaining with Trane. (App. F at App. 34 - App. 35.)

At the Meetings, George Snapp, Jr., (Altec's representative) employed in management at plant three and who was to continue in such a capacity for Altec, said that the goal was to see most of the plant three employees transfer to Altec. Snapp explained that said employees, including the plaintiffs, were critical to the success of Altec. Snapp promised that if the plaintiffs transferred to Altec, the transfer would not take anything away from the plaintiffs; specifically they were promised that they would not lose any benefits that they would have had if they had remained with

Trane. (App. F at App. 35.)

Also at the Meetings, Arthur Holmes, of Altec, told the plaintiffs that he would be unable to buy Trane's brazed aluminum operation unless the employees transferred to Altec. Holmes further assured the plaintiffs that should they transfer to Altec, they would have nothing to fear because they would not lose any benefits, and it was going to be just like continuing to work for Tra e. (App. F at App. 35.)

At one of the Meetings, the employees present at the meeting were shown by Altec a comparison of benefits between those at Trane and those they would receive if they transferred employment to Altec. (App. F at App. 35.)

On a number of occasions, Holmes walked around the plant three floor encouraging employees, including the plaintiffs, to transfer their employment to Altec. Snapp also walked around the plant floor on numerous occasions telling the employees that they had nothing to worry about by transferring to Altec because they would not lose any of the benefits from their years working for Trane. (App. F at App. 35 - App. 36.)

Relying on the above promises of Altec and the comparison of benefits between Trane and Altec, the employees decided to transfer to Altec. (App. F at App. 36.) Petitioners-employees were assured by Altec in 1985 and 1986 that they would not lose any Trane benefits that they would have had at Trane on their retirement from Trane. It was represented that the employees' benefits would not change from the Trane benefits. (App. F at App. 35 - App. 36.)

Altec did, in 1986, distribute documents to the employees that showed Altec employee benefits calculations. While the documents presented by Altec stated the retirement formula for others who would be hired as Altec employees, Altec assured the plaintiffs that in consideration for their leaving Trane, Altec would make up the difference between what they would receive under the Altec formula and what they would have received if they had remained at Trane. These documents did not in any way indicate that the benefit calculations and information from the documents applied to the plaintiffs as former Trane employees. See Defendants' Brief. (App. H at App. 73 - App. 74.) Based upon the representations made by Altec, the petitioners-employees had no basis to believe that the pension calculations in the documents served any purpose other than as a comparison between what non-former Trane employees would receive versus what the employees who transferred from Trane would receive from Altec. Thus, these documents do not provide petitioners-employees any basis to believe that the benefits they were to receive would be anything different than from the benefits previously promised to them by the Altec officials in 1985 and 1986.

In October of 1994, plaintiff James Spangler (hereinafter "Spangler") spoke to fellow employee and plaintiff Oswald Klomsten (hereinafter "Klomsten") regarding Klomsten's intent to retire. Klomsten requested that Altec calculate his anticipated pension benefits. (App. F at App. 36.)

Based on the information given them by Altec, Spangler and Klomsten first learned Altec was calculating Klomsten's pension benefits wrong in that his combined Trane and Altec pensions totaled an amount less than the

pension he would have received had he worked continuously at Trane over the same number of combined years. Klomsten was not receiving the promised benefits he would have received if he had stayed at Trane. (App. F at App. 36.)

On March 17, 1995, Spangler met with Arthur Holmes regarding Altec's refusal to pay the benefits Altec promised. Holmes refused to take any action to rectify the situation. (App. F at App. 36 - App. 37.)

Spangler subsequently discussed his concerns with several fellow Altec employees and was informed by each of them that they too were told that transferring their employment from Trane to Altec would not result in the loss of any benefits, including pension benefits, in comparison to the benefits they would receive had they worked for Trane continuously for the same number of years as their combined Trane and Altec service. (App. F at App. 37.)

As a result of Altec's failure to pay as promised, the Plaintiffs have suffered a loss of pension, health care, and vacation benefits. (App. F at App. 37.)

Two years and seven months after Altec's initial failure to pay as promised, and after Plaintiffs' first knowledge of Altec's breach, Plaintiffs commenced this action on May 13, 1997. The plaintiffs filed their complaint with claims for breach of fiduciary duty under ERISA §502(a)(3), to declare and enforce rights under certain employee benefit plans pursuant to ERISA §502(a)(1)(B), ERISA federal common law for estoppel, and alternative claims for fraudulent representations under Wis. Stat. §100.18, and breach of a contract under state law.

This action was commenced in the United States District Court for the Western District of Wisconsin on May 13, 1997. An amended complaint was filed on October 3, 1997. The claims included causes of action for breach of fiduciary duty under ERISA §502(a)(3); the action also sought to declare and enforce plaintiffs-petitioners' rights under certain employee benefit plans pursuant to ERISA §502(a)(1)(B). Claims also included causes of action for ERISA federal common law for estoppel, and alternative claims for fraudulent representations under Wis. Stat. §100.18, and breach of contract under state law. (App. G at App. 49 - App. 70.)

On February 12, 1998, defendants moved for partial summary judgement requesting the dismissal of all claims except those for vacation benefits. After submission of briefs, affidavits and other supporting documents by both sides, the district court granted defendants motion on April 13, 1998 dismissing plaintiffs' federal claims. The district court did so on the basis that the statute of limitations had run before the commencement of this action. (App. C at App. 12 - App. 23.)

On May 11, 1998, the district court rendered its opinion and order that the district would relinquish its jurisdiction of plaintiffs' remaining state law claims and dismissed the claims without prejudice. On May 12, 1998, Judgement of dismissal was entered. (App. D at App. 24 - App. 29.)

The plaintiffs filed their notice of appeal on June 8, 1998.

In the appeal to the Seventh Circuit, petitioners-

employees argued, pursuant to the application of 29 U.S.C. 1113(1)(A), this last act constituting a breach could not have occurred prior to the time when Altec first denied pension benefits by issuing benefit checks of less than what had been previously promised. This occurred in October 1994.

Similarly, petitioners-employees argued that as the first performance in accordance with the prior representations made by Altec in 1985 and 1986 did not occur until 1994 and considering the fact that petitioners-employees had no notice, whatsoever, of any actual or anticipated breach or failure to perform in accordance with the fiduciary duties established by the 1985 and 1986 representations of Altec, until 1994 and considering the fact that the action was filed on the 13th day of May, 1997 (two years seven months from the first notice) the action could not be barred by the applicable statute of limitations. (App. F at App. 31 - App. 49.)

Nevertheless, the Court of Appeals in its judgment of February 9, 1999 concluded that any breach of fiduciary duty in violation of ERISA by Altec occurred when the employees accepted employment with Altec between approximately the time frame of 1986 and 1988 and thus, the action was untimely and barred by the statute of limitations. In reaching this decision, the Court of Appeals, while noting that there was "no case law on the application of ERISA § 413's six year statute of limitations to what we will refer to as a *Varity* breach of fiduciary duty claim" the Court of Appeals for guidance then looked to the law of intentional misrepresentation. From this, the Court of Appeals determined that a misrepresentation cause of action becomes viable when there is action in reliance upon the representations. Thus, by applying this logic, the Court of

Appeals determined that the actions in reliance upon the subject Altec's representations and/or misrepresentation occurred in the approximate time frame from 1986 to 1988 and thus the statute of limitations had run before suit was commenced herein. (App. A at App. 1 - App. 9.)

However, the Court of Appeals did not address the fact that no performance was required pursuant to the 1985 and 1986 representations until 1994 and thus, until there was a failure to perform, in these circumstances, there could be no breach of a fiduciary duty (nor notice of a breach) and in fact, petitioners-employees would not even have a claim for breach of fiduciary duty or for misrepresentation against Altec until there was both a breach and until a harm had occurred. Until the payments that should have been made were not made, plaintiffs had suffered no damage; nor did they have any basis for anticipating that they would suffer any damages.

In addition, the Court of Appeals failed to consider the momentous ramifications of its decision. Applying its decision, petitioners-employees literally lost their rights to bring an action (pursuant to the Court of Appeals' logic) before petitioners had suffered any harm, or before petitioners even had any notice, whatsoever, of any breach or of any harm.

Although it was argued to the Court of Appeals, the Court of Appeals disregarded the fact that although the representations made by Altec to petitioners were made in 1985 and 1986, the petitioners-employees had no knowledge or notice whatsoever of any breach or failure to perform in accordance with these promises until late 1994. Under the Court of Appeals' analysis in its decision, petitioners-

employees cause of action ran in 1992, over two years before any petitioners-employees had any notice that there had been, or would possibly be, a breach of any duty by Altec. It was also two years before there was any failure to perform Altec's promised fiduciary duties. Nevertheless, under the Court of Appeals' analysis in this case, the petitioners-employees lost their right to bring this action before they had any basis to conclude that their right to bring this existed and existed before they knew they would suffer any harm. (App. A at App. 1 - App. 9.)

These facts were again brought to the Court of Appeals' attention in a Petition for Rehearing which was filed on February 23, 1999. (App. I at App. 75 - App. 87.) The Court of Appeals, on March 12, 1999, denied said Petition for Rehearing. (App. B at App. 10 - App. 11.)

B. Basis for Federal Jurisdiction

The district court had federal jurisdiction under 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Conflicts With the Decisions of Other Courts and Is Inconsistent With Determinations by the Supreme Court.

When one considers the facts of the present case, in view of the decision of the United States Supreme Court in *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1965, 134 L.Ed.2d 130 (1996) and in view of the federal case law as will hereinafter be cited in this section, it is clear that under the facts of this case, the Court of Appeals erred when it stated that:

> "There is no case law on the application of ERISA §413's six year statute of limitations as to what we will refer to as a *Varity* breach of fiduciary duty claim. . ."

(App. A at App. 6.)

After reaching this erroneous conclusion, the Court of Appeals then went on to determine that under the facts of the case, the statute of limitations ran at least two years before any petitioners-employees had any notice of any potential breach of fiduciary duty and at least two years before any required performance was required of the fiduciary to act in accord with the prior representations made. However, in this regard, the Court of Appeals' decision, in fact, conflicts with federal case law and is inconsistent with the Supreme Court's decision in *Varity Corp. v. Howe*, Supra.

As indicated in the factual background, plaintiffs-petitioners are a number of former employees of the Trane

Company who in 1985 and 1986 were induced to leave the Trane Company and join Altec. Among the representations made by the Altec officials to induce the Trane Company employees to join Altec, were specific representations and promises that the Trane Company employees would lose no benefits, including pension benefits. It was represented that if the employees joined Altec, their pension benefits would be the same as if they had stayed with Trane Company. In view of representations such as these, the plaintiffs-petitioners left the Trane Company and joined Altec in 1985 and 1986. It is plaintiffs-petitioners' contention that the representations made in 1985 and 1986 by the Altec officials created a fiduciary duty on behalf of the Altec officials to act in accordance with the representations made. For purposes of the issues on appeal, this is undisputed.

However, it was not until October 1994, when one of the plaintiffs-petitioners, requested that Altec calculate pension benefits because of a pending retirement, that the plaintiffs-petitioners learned that Altec would not perform in accordance with its fiduciary duties as established by its prior representations. Until this time, none of the plaintiffs-petitioners herein had any knowledge or notice of **any** such breach or intended breach of fiduciary duty by Altec.

Nevertheless, despite the above fact, the Court of Appeals determined that as plaintiffs-petitioners had acted in reliance upon the representations made by joining Altec in 1985 and 1986, those actions of joining Altec triggered the running of the ERISA statute of limitations as set forth in 29 U.S.C. § 1113(1)(A) and determined that:

> "The last action which constituted a part of the breach 'occurs when the employee takes an irrevocable action or reliance on the fiduciary's representations.'"

(App. A at App. 7.)

The Court of Appeals determined that the six year period for the statute of limitation began to run in 1985 and 1986 and thus at the latest, such limitations ran in 1992, over two years before any plaintiff-petitioner had any knowledge or notice of a breach, or before any harm to plaintiffs-petitioners had occurred.

As demonstrated before, this logic and analysis of the Court of Appeals directly conflicts with federal case law.

A breach of fiduciary duty cause of action does not depend on whether or not the representations made were intended to be misrepresentations. Whether the 1985 or 1986 representations were misrepresentations is not determinative. The determinative issue is that the representations made in 1985 and 1986 created a fiduciary duty on the part of Altec to abide by and act in accordance with the representations made.

Accordingly, there could be no breach of a fiduciary duty until Altec, in fact, failed to perform in accordance with the promises made. This, the record clearly shows, did not occur until 1994. The Court of Appeals in determining that the breach occurred when the plaintiffs-petitioners acted in reliance upon the breach by joining Altec, disregarded the facts and the law. Plaintiffs-petitioners submit that case law, including *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct.

1065, 134 L.Ed.2d 130 (1996) supports plaintiffs-petitioners arguments herein and that the Court has misapprehended the law as set forth in *Varity*. In discussing the breach of fiduciary duty cause of action in ERISA cases, the Supreme Court in *Varity* specifically characterized "a denial of benefits as a breach of fiduciary duty," see *Varity* at 516 U.S. 514. It is thus evident that the Supreme Court recognized that a breach of fiduciary duty occurs when the denial of benefits occurs, **not** when the representations which created the duty were made.

To further understand this logic, consider the following hypothetical. Assume that in 1985 and 1986 the oral representations had been reduced formally to a written plan that was then given to the employees. Further assume that Altec, in 1994, began to pay benefits that conflicted with the written plan. Presumably, in such a case, the Court of Appeals would consider that in a breach of fiduciary duty claim, the cause of action would occur when the failure to perform occurred. The plan created the duty, and the duty was breached when there was a failure to perform. The plaintiffs-petitioners cause of action, herein, is not substantially different from this hypothetical.

The Court of Appeals in *Meagher v. International Association of Machinists and Aerospace Workers Pension Plan*, 856 F.2d 1418 (9th Cir. 1988) has applied similar logic. This case also addressed the application of the statute of limitations to a breach of fiduciary duty cause of action under ERISA; in doing so, *Meagher* held that the six-year statute of limitations provision pursuant to 29 U.S.C. §1113 began to run with the issuance of each check that was not in accordance with the benefits to which the Plaintiff was entitled. "Thus, the issuance of each check commenced a

six-year period. . ." See *Meagher* at 856 F.2d 1418, 1423. For similar holdings see also *Tolle v. Carroll Touch, Incorporated*, 977 F.2d 1129, 1139 (7th Cir. 1992).

In addition, the following quote from *Starr v. JCI Data Processing, Inc.*, 767 F.Supp. 633, 637-638 (N.J. 1991) is also in accord with the above discussed holdings and logic:

> In the absence of actual knowledge, § 1113 mandates application of a limitations period of six years after the date of the last action constituting part of the breach or, in the case of omission, the latest date on which the fiduciary could have cured the breach or violation. (For applications see, e.g., Davidson v. Cook, 567 F.Supp. 225, 234 (E.D.Va.1983), aff'd, 734 F.2d 10 (4th Cir.1984), cert. denied, Accardi v. Davidson, 469 U.S. 899, 105 S.Ct. 275, 83, L.Ed.2d 211 (1984) (last action was last disbursement of funds pursuant to loans made not in interest of plan beneficiaries); Buccino v. Continental Assur. Co., 578 F.Supp. 1518, 1521 (S.D.N.Y.1983) (last action was last time fund was injured by making premium payment due to fiduciaries' failure to advise fund to divest itself of unlawful or imprudent investments).) This language is unusually broad in allowing employees to pursue their claims in a timely fashion while hampering an employer's effort to hide behind a time bar. Thus, the language comports with Congress' intent in ERISA "'to remove jurisdictional and procedural obstacles which in the past appear to have

> hampered effective ... recovery of benefits due to participants.' " S.REP. NO. 127, 93d Cong., 1st Sess. 35 (1973), quoted in Connors v. Hallmark & Son Coal Co., 935 F.2d 336 (D.C.Cir.1991).

The Court of Appeals' decision here conflicts with the federal case law as above set forth.

By determining in the present case that the ERISA statute of limitations ran two years before plaintiffs-petitioners had any notice of the breach, the Court of Appeals' decision also conflicts with other federal case law on the issue of notice. As stated in *Ziegler v. Connecticut General Life Insurance Company*, 916 F2d 548, 552 (9th Cir. 1990):

> We stress that an ERISA plaintiff's cause of action cannot accrue and the statute of limitations cannot begin to run until the plaintiff has actual knowledge of the breach, regardless of when the breach actually occurred. The ERISA statute of limitations, 29 U.S.C. § 1113, requires satisfaction of this second prerequisite, the plaintiff's actual knowledge of the breach, before the statute can begin to run. (Emphasis added.)

The Court of Appeals' decision herein conflicts the body of case law that holds that a breach of fiduciary duty cause of action **cannot** accrue until the aggrieved parties have knowledge of the breach. Further, the decision conflicts the body of law that holds that for statute of limitation purposes the last act constituting a breach of

fiduciary duty is when the fiduciary fails to act in accordances with the promised duties.

II. The Decision of the Court of Appeals Departs From the Usual Course of Judicial Proceedings and Is Inconsistent With Long Established Legal Principles so as to Call for an Exercise of This Court's Supervisory Power.

The Court of Appeals herein determined that there was no case law that addressed the application of ERISA's six year statute of limitations for *Varity* breaches of fiduciary duty claims and thus looked, by analogy, to the law on intentional misrepresentation to determine when an intentional misrepresentation cause of action would accrue so as to trigger the running of the statute of limitations. (App. A at App. 6 - App. 8.) In applying this mistaken analysis, the Court of Appeals determined that the triggering events starting the statute of limitations period running was when the petitioners-plaintiffs-employees acted in reliance upon the fiduciary's representations. However, this logic, and this analysis, is contrary to long recognized legal principles.

In discussing breach of fiduciary duty claims under ERISA, the Supreme Court in *Varity* recognized

> "that these fiduciary duties draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment."

See *Varity* at 516 U.S. pg. 496. Further, on the same page, the Supreme Court goes on to note that when Congress

enacted the ERISA legislation, rather than

> "explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility."

See *Varity*, Supra.

It is fundamental trust law (contrary to the Court of Appeals' analysis) that a cause of action cannot accrue or the statute of limitations cannot begin to run until there has either been harm or knowledge of the breach.

> When the trustee violates any of his obligations under the trust, or denies the trust, repudiates all of his duties under it, and claims the trust property as his own, then a cause of action arises in favor of the beneficiary and the Statute of Limitations starts to run. It is well settled that in express trusts, and as between beneficiary and trustee, the Statute of Limitations runs from the date when the beneficiary knows or should by the use of ordinary care have known of a breach or a repudiation of the trust by the trustee. See *Handbook of the Law of Trusts* by Bogert, Chapter 20, § 170, page 642.

> Similarly,

> "A trustee is liable in damages for losses to the beneficiaries caused by a breach of trust.

> The cause of action may be enforced by the beneficiaries or by a successor trustee."

See *Handbook of the Law of Trusts*, Supra., Chapter 20, §157, page 562.

Further, §205 of the *Restatement Second of Trusts*, provides, in part, as follows:

> §205. Liability in Case of Breach of Trust
>
> If the trustee commits a breach of trust, he is chargeable with
>
> (a) any loss or depreciation in value of the trust estate resulting from the breach of trust;

Restatement Second of Trusts, §205, page 458.

Implicit from the above quotes from the *Restatement Second of Trusts* and from §157 of the *Handbook of the Law of Trusts* is that for there to be a cause of action for breach of trust, there first must be a loss. A breach of trust cause of action cannot exist without such a loss.

Also relevant is the following quote from 37 C.J.S. *Fraud* §7 Breach of Fiduciary Duty, page 183, which states as follows:

> The elements of a cause of action for participation in a breach of fiduciary duty are: breach by the fiduciary of a duty owed to plaintiff; defendant's knowing participation in

the breach; **and damages**. (Emphasis added.)

The Court of Appeals' decision departs from these basic principles from the law of trusts, and thus, under *Varity*, from the law of breaches of ERISA breach of fiduciary duties.

Nevertheless, even if one applies an intentional misrepresentation analysis, however, the Court of Appeals in its decision has departed from the usual course of judicial proceedings and its decision is inconsistent with long established legal principles.

The United States Supreme Court has recognized that in common law, with a cause of action based upon fraud both "intent and injury have been deemed the essential elements in a damage suit. . ." see *Securities & E. Commission v. Capital Gains Research Bureau*, 375 U.S. 180, 192, 84 S.Ct. 275, 283, 11 L.Ed.2d 237, 247 (1963).

Espousing similar general legal principles, are the following:

> "However, because damages are a central element of a fraud action..." See 37 C.J.S. *Fraud* §93, page 297.
>
> "Fraud without damage or injury is not remediable..." See 37 C.J.S. *Fraud* §50, page 238.
>
> "Generally speaking, plaintiffs may recover when he shows that he has sustained some pecuniary damage or injury..." See 37 C.J.S.

Fraud §51, page 239.

Many cases have also recognized damages as a necessary element for a fraud cause of action. As an example, see *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 279 (2nd Cir. 1992).

From the above discussion, it is evident that the Court of Appeals' subject decision has significantly departed from accepted and long established legal principles.

Despite the Court of Appeals' holding, a cause of action for breach of fiduciary duty does **not** occur when a party acts in reliance on the representations made. The cause of action occurs when harm occurs or when knowledge of the harm occurs. Therefore, because of the Court of Appeals' departure from long established legal principles and due to the powerful inequitable ramifications of the decision, it is necessary that the Supreme Court clarify how the ERISA statute of limitations will apply to such breach of fiduciary duty claims; it is necessary for the Supreme Court to step in and clarify this issue for all future litigants.

III. The Court of Appeals' Failed to Consider the Inequitable Effects of Its Holding on Petitioners-Plaintiffs and Others.

As noted in *Starr v. JCI Data Processing, Inc.* at 767 F.Supp. 633, 638:

> "... Congress' intent in ERISA "[is] 'to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective ... recovery of benefits due

> to participants.' " S.REP. NO. 127, 93d Cong., 1st Sess. 35 (1973), quoted in Connors v. Hallmark & Son Coal Co., 935 F.2d 336 (D.C.Cir.1991)."

From this, it is clear that one policy goal of ERISA is to remove the hurdles that have prevented employee and benefit plan litigants from enforcing their rights to pension and other benefits.

Plaintiffs-petitioners respectfully submit that despite this policy, the ultimate effect of the Court's decision in this case is to permit employers and benefit plan administrators to make representations and promises to employees and plan participants as to the nature and extent of benefits and yet not abide by those promises if six years pass and if in the interim, the employees could not learn that there will not be performance in accordance with the representations made. Under the Court's holding, if six years have passed since the time of the representations, regardless of the circumstances, the participants, the innocent victims, would be left with no recourse despite the fact that they had no knowledge until the time the benefits actually accrued and performance was required. The effect is that the plan participants such as the plaintiffs-petitioners in the present case have forever lost their right to bring an action even before they suffered damage and before they knew there was a right to pursue. This is in direct contravention of the above espoused ERISA policy.

This holding therefore has potentially momentous ramifications, not only to the parties in the present case, but to any and all other plan participants who might be victims of *Varity* type breaches of fiduciary duties. The earliest any

participant in this case was aware that any wrong had, or would, occur to them in violation of Altec's fiduciary duties to plaintiffs-petitioners was in 1994. If they were not aware of the wrong that occurred, or that would occur, they surely would not be aware that there was any basis to bring a claim to enforce their rights. If this decision is not reviewed, employees can lose their remedy before they realize they need it. The patent unfairness and inequity of this cannot be understated, particularly in view of the policy set forth above.

In view of this unfairness and the fact that the Court of Appeals' decision conflicts with other Federal Court holdings which require a breach or, at least, the knowledge that there will be a breach, before an ERISA breach of fiduciary duty cause of action can accrue, it is requested that the Supreme Court exercise its supervisory power to intervene and clarify the law on this important issue for potentially all litigants who seek to enforce ERISA breach of fiduciary duty claims.

CONCLUSION

The petitioners' case is yet to be fairly heard. For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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